Supreme Court, U. S.
FILED
OCT 19 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-659

GERHARD FORSTNER,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Gerhard Forstner, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit affirming a decision of the Immigration and Naturalization Service ordering his deportation from the United States.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has been published at 579 F2d 506 and appears as Appendix A to this petition. The opinion and decision of the Board of Immigration Appeals of August 9, 1977, is unpublished and appears as Appendix B. The opinion and decision of the Immigration Judge dated November 2, 1976, is unpublished and appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was made and entered July 7, 1978. A timely petition for rehearing was denied on August 2, 1978, without opinion, and the order appears as Appendix D. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 USC Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Can an alien be deported as one guilty of violating a state law governing the sale,

exchange, disposition, or giving away of marijuana, when the state law makes not only that conduct criminal, but includes within its scope barter of, and mere offers to sell, contraband, and the order of conviction does not specify the precise act upon which criminal liability was based?

2. If an alien has been convicted of a misdemeanor violation of a state law relating to marijuana and the state provides a method of expungement of that conviction as part of a plan for rehabilitation of such offenders, and the expungement would remove the conviction as a ground for deportation, can the INS deport the alien before he has had an opportunity to apply for expungement?

3. Is a conviction sufficiently final to be a ground for deportation when imposition of sentence was suspended and the conviction may be set aside and expunged after three years?

4. Was petitioner denied due process of law when, after a deportation hearing has ended, the Government was allowed to reopen the hearing

and file amended charges of deportability without making the factual showing required by the regulations issued by the INS?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution; 8 USC Sec. 1251(a)(11); Oregon Revised Statutes, Secs. 167.202; 167.207, 137.010; 137.225; 137.230. These provisions are included in the Appendix.

STATEMENT OF THE CASE

The jurisdiction of the Court of Appeals to review the decision of the Board of Immigration Appeals was based upon 8 USC Sec. 1105a (Immigration and Nationality Act, Sec. 106(a).) Petitioner Gerhardt Forstner was born in Austria on March 28, 1948 and was admitted to the United States as a permanent resident on December 11, 1972. He is married to a United States citizen and he and his wife had purchased a home in Eugene, Oregon. He used to operate a small automotive repair shop, but now works as a mechanic.

On October 2, 1975 Forstner was indicted in the Circuit Court of the State of Oregon for Lane County by two indictments charging "illegal furnishing of narcotics." One of the indictments

was dismissed on January 27, 1976 on the same day that an order of probation was entered in the other case. The dismissal recited a plea bargain whereby defendant agreed to plead guilty to one indictment and the district attorney agreed to dismiss the other. The court received Forstner's guilty plea and suspended the imposition of sentence for a period of 18 months, during which he was placed on probation and required to obey the general rules of probation and pay a $275 fine, plus a $5 assessment within one year.

On May 27, 1976, the Immigration and Naturalization Service filed an order to show cause and charges of deportability against Forstner alleging that he had been convicted of the offense of illegal furnishing of narcotics and was deportable under Section 241(a)(11) (8 USC Sec. 1251(a)(11)) of the Immigration and Nationality Act.

A deportation hearing was begun in Portland, Oregon June 15, 1976 and the charges of deportability were denied by Forstner. At the conclusion

of the hearing, the Government trial attorney expressed a desire to file amended charges of deportability and over the objections of Forstner, the hearing was reopened and the amended charges were permitted to be filed. The hearing was continued until August 18, 1976. At that time the alien denied the amended charges and the Immigration Judge took the matter under advisement.

The Immigration Judge ruled that Forstner was deportable on November 2, 1976, and a timely appeal to the Board of Immigration Appeals was taken. The Board of Immigration Appeals found Forstner deportable on August 9, 1977, and a timely petition for review was filed with the United States Court of Appeals for the Ninth Circuit. That Court in a per curiam decision dated July 7, 1978 affirmed the order of deportation and on August 2, 1978, it denied a timely petition for rehearing.

REASONS FOR GRANTING THE WRIT

POINT I

An alien should not be deported when the record of conviction makes it questionable whether the crime is a ground of deportation under the Immigration and Nationality Act.

Originally Forstner was indicted for "furnishing" marijuana to another, but the order of probation only mentions that he was indicted upon a charge of "illegal furnishing of narcotics". Nowhere in the order is there any mention of marijuana or any other illegal substance.

The guilty plea by Forstner was arrived at through plea bargaining. It is the common practice of prosecutors to "over indict" so that their hand is strengthened during the process of negotiating for guilty pleas. For this reason the record of conviction used in deportation cases does not include indictments, complaints or preliminary criminal charges, but only the documents reflecting a plea of guilty or a conviction by a jury, and subsequent judgment entered thereon.

Clearly, the conviction can be for a crime other than that originally charged, and commonly

this is the case.

Inasmuch as the order of probation in this case contains no reference to the specific substance charged in the order to show cause, there is insufficient evidence to support a violation of any of the provisions of Section 241(a)(11) INA and thus no proof of a ground of deportation.

Moreover, the record of conviction only indicates that Forstner was convicted of "furnishing" under the Oregon Criminal Activity in Drugs statute, ORS 167.207. The Oregon law specifically includes "barter" among the illegal acts defined in ORS 167.202(3) and also includes as an offense "an offer" to sell, barter, exchange, give or dispose to another a banned substance. The Oregon Court of Appeals has interpreted the criminal activity in drugs statute as including a mere offer to sell marijuana to another, even in the absence of a conspiracy or a subsequent sale by the defendant. State v. Templeton, 22 Or App 322, 538 P2d 950 (1975); 23 Or App 39, 541 P2d 163 (1976). As the court stated in Templeton:

> "While the defendant's conduct . . . arguably did not constitute 'furnishing', there was other evidence which established that at the October 17 meeting between defendant and Officer Muncie at defendant's residence, defendant expressly offered and agreed to furnish Muncie with marijuana to be procured by defendant's cousin, and that defendant and his cousin then went out to secure the drug. This evidence was sufficient to prove the offense, even though this transaction fell through because of the inability of defendant and his cousin to locate a source." 22 Or App at 326.

If such conduct is within the scope of the Oregon statute, assuredly it is not within the purview of Section 242(a)(11) INA. That statute is limited to the following situations:

> (1) A narcotic drug addict. (Not charged in the order to show cause.)
>
> (2) One convicted of a violation of or a conspiracy to violate a law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana. (Not charged in the order to show cause.)
>
> (3) One convicted of a violation of or a conspiracy to violate a law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of certain drugs, including marijuana (charged in the order to show cause).

> (4) The one convicted of a violation of or conspiracy to violate a law or regulation governing the possession of illicit substances for the above purposes (not charged in the order to show cause).

It can readily be seen that an offer to furnish a drug is not a conspiracy for it falls short of an agreement, U.S. v. Feola, 420 U.S. 671 (1975) at 694, nor is it a violation of a law relating to the "taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation" of a forbidden substance.

It is a failure of the government to meet its burden of proof when it proves only a conviction which is ambiguous on its face and could have included an offense which was a crime under state law but not a ground for deportation. Matter of Paulus, 11 I&N Dec. 274 (BIA, 1965).

This Court has held that no one may be deported except upon clear, unequivocal, and convincing evidence of deportability. Woodby v. INS, 385 U.S. 276 (1966). Under the circumstances

in this case, it cannot be said that Forstner was clearly and unequivocally guilty of a ground for deportation.

POINTS II and III

A conviction for a minor marijuana offense should not be final for deportation purposes when imposition of sentence was suspended and the conviction may be set aside and expunged after three years.

Prior to 1974 expungements for elimination of a record of conviction of a narcotics offense under Sec. 241(a)(11) INA did not affect deportability. Matter of Arrellano-Flores, 8 I&N Dec. 429. Then the Board ruled in Matter of Zingis, 14 I&N Dec. 621 (BIA 1974) that an alien sentenced under the Federal Youth Corrections Act who had completed the conditions of his sentence and received a Certificate of Expungement could not be deported because the ground for deportation had been eliminated. In the same year, the Board applied the rule in Zingis to state expungements which were the "functional equivalent" of the Federal Youth Corrections Act. Matter of Andrade, 14 I&N Dec. 651 (BIA 1974).

In Matter of Berker, __ I&N Dec. __, Int. Dec. 2511 (BIA 1976), the Board extended the Zingis rule to include expungements under the Federal Youth Corrections Act involving narcotic offenses

other than simple possession of marijuana. In the case of In re: Ritchie (A19187028), the Board of Immigration Appeals affirmed an order of deportation of an adult alien who had been convicted in California for possession of a small amount of marijuana for personal use. The conviction had been subsequently expunged under California law. The office of legal counsel of the Attorney General advised the Board that its decision in Ritchie was difficult to reconcile with the Andrade-Zingis rule. Thereafter the Service terminated the deportation proceedings.

Thus, the rule in Andrade-Zingis has been extended to encompass adult, as well as youthful offenders. In Rehman v. INS, __ F2d __ (2d Cir, Oct. 14, 1976), it was held that an alien who had obtained a New York expungement of a marijuana possession conviction is not deportable. The court there pointed out that had the defendant been tried on federal rather than state charges, he would probably have been placed on probation without the entry of a plea and there would have been no record of conviction.

It is Forstner's position that the Oregon law provides for the functional equivalent of the rehabilitation statutes under which other aliens have been relieved from deportation. ORS 137.225 provides for the setting aside and expungement of criminal records, including Forstner's, after a three year period, during which the defendant remains free of difficulties with the law. Once an order setting aside a conviction is entered it is an adjudication that the prior proceeding is removed of record for all purposes and "shall be deemed not to have occurred." Taken together with the power of the Court to suspend the imposition of sentence, the expungement provisions of Oregon law create a plan for the rehabilitation of those charged with minor offenses and their restoration to society without the stigma of a criminal conviction. This is indeed the functional equivalent of the Federal Youth Corrections Act and the California Sealing of Records Law.

In this case, Forstner was given an eighteen month period of probation, which ended in July 1977, and the Court entered an order denominating his offense as a misdemeanor so that Forstner, as a person with only one conviction, is eligible to have it expunged after a three year period of good conduct.

In an unreported case, the Board of Immigration Appeals remanded a deportation proceeding based upon an alleged violation of Section 241(a)(11), implying that the Immigration Judge should hold the case until the respondent had an opportunity to apply for expungement under the Federal Youth Corrections Act. Matter of Amiro Duran (BIA June 3, 1976, A17 900 820). It is suggested that the same procedure should have been followed in this case, thus allowing Forstner an opportunity to clear his record in compliance with the Oregon Rehabilitation Plan. The Government in moving against Forstner and attempting to deport him, is attempting to cut short the Oregon program for the rehabilitation of minor offenders.

It is settled law that a conviction which is subject to reversal on appeal is not a ground for deportation; by the same logic, a conviction which is subject to being expunged should not be a ground for deportation.

In both cases the conviction is not deemed sufficiently final to become a ground for deportation.

It is true that the Ninth Circuit continues to hold to an out-moded rule in cases decided in 1962 and cited in the Court's opinion. This position appears to be at odds both to administrative practice by the Immigration and Naturalization Service and at least some of the cases, as well as the principles upon which Rehman v. INS, supra, was decided.

POINT IV

Petitioner was denied due process of law when the Government was allowed to reopen the hearing and file amended charges of deportability without making a factual showing as required by the regulations.

At the end of the deportation hearing on June 15, 1976, the Government rested its case and the alien made a motion to terminate because the charge of deportability in the order to show cause alleged that he was an alien who had been convicted of furnishing narcotics and the evidence adduced by the Government showed that he, at the most, had been guilty of furnishing marijuana. Inasmuch as these are two separate bases for deportation under Sec. 241(a)(11) INA, the charge in the order to show cause was not established. The Immigration Judge apparently agreed with the alien's position, but he permitted the government to file an amended charge specifying marijuana. Indeed, the record shows that the Government trial attorney had a copy of the amended charge prepared all during the hearing, but chose to wait until it was completed before offering it.

The alien objected to the filing of the lodged (amended) charge, but to no avail. The hearing was continued for two months.

8 CFR Sec. 242.106(d) states that the Government trial attorney may file additional charges of deportability at any time "during a hearing".

8 CFR Sec. 242.22 provides that motions to reopen or reconsider deportation hearings when evidence sought to be offered is material, not available and could not have been discovered or presented at the hearing. The regulation incorporates 8 CFR Sec. 103.5, which requires a written motion to reopen, which states the new facts to be proved and support by affidavits or other evidentiary material.

The Government failed to comply with any of the provisions regarding the filing of additional charges of deportability or reopening a hearing.

Contrary to the holding of the Court of Appeals, the disregard of the regulations by the Immigration Judge was highly prejudicial to

Forstner. If the additional charges had not been filed the Immigration Judge would have been required to terminate the deportation proceedings in favor of Forstner. Although this would not have barred a new and separate deportation proceeding, the exercise of the District Director's discretion would have been required to do so and upon review of the case it is quite possible that he would have decided not to proceed with further deportation hearings. This is especially true in light of the Immigration and Naturalization Service's Operations Instruction Sec. 242.1(a)(28), which was adopted in December of 1976, and codified in the Service's Operations Instructions as of April 27, 1977. This instruction states that no order to show cause shall be issued in the case of an alien who is a lawful permanent resident of the United States and whose deportability is based upon Sec. 241(a)(11) as one having been convicted of the possession, importation or distribution of marijuana for no remuneration and the amount of marijuana does not exceed 100 grams, provided the alien has been convicted of only one such offense.

Consequently, the Immigration Judge's ruling deprived Forstner of the benefit occasioned by another review by the District Director.

CONCLUSION

This Court should grant certiorari and the judgment below should be reversed and deportation proceedings against Forstner terminated.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERHARD FORSTNER,
Petitioner,

vs.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

No. 77-3026

OPINION

On Petition to Review a Decision of the U.S. Immigration and Naturalization Service

Before: BROWNING and ANDERSON, Circuit Judges, and WATERS*, District Judge

PER CURIAM:

Petitioner was found deportable under section 241(a) (11) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1251 (a)(11), requiring deportation of any alien convicted of drug-related offenses described in the statute.

Petitioner contends that the record made by the government in the deportation proceeding does not establish that the offense of which he was convicted fell within the scope of section 1251 (a)(11). The record shows that petitioner pleaded guilty

*Honorable Laughlin E. Waters, District Judge, Central District of California, Sitting by designation.

to violating Oregon Revised Statute Sec. 167.207 which makes it unlawful to "furnish" a narcotic or dangerous drug. "'Furnishes' means to sell, barter, exchange, give or dispense to another, or to offer or agree to do the same . . . ." O.R.S. Sec. 167.202(3). Petitioner contends that because the Oregon statute makes it unlawful to "offer" or "agree" to "barter" drugs, whereas section 1251 (a)(11) of the Act applies to "conspiracies" and does not mention bartering, a conviction under the Oregon statute may have been for conduct not within section 1251 (a)(11).

Section 1251 (a)(11) extends broadly to any violation of or a conspiracy to violate "any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana, or . . . any law or regulation governing or controlling the . . . sale, exchange, dispensing, (or) giving away" of those substances. Nothing in the legislative history suggests Congress intended to limit the broad scope of this language. We agree with the Board of Immigration Appeals that it encompasses the conduct made unlawful by the Oregon statute.

Petitioner argues that he was not "convicted" within the meaning of section (a)(11), but pleaded guilty. A plea of guilty is tantamount to conviction. E.g., Boykin v. Alabama, 395 U.S. 238, 242 (1969). The conviction was no less final for purposes of section 1251 (a)(11) because it may at some future time be expunged under Oregon Revised Statute Sec. 137.225. E.g., Zabanazad v. Rosenberg, 304 F.2d 639, 640 (9th Cir. 1962); Adams v. United States, 299 F.2d 327, 331 (9th Cir. 1962).

Nothing indicates that the Service failed to abide by its policy of not instituting deporation proceedings against aliens convicted of possession, importation, or distribution of less than 100 grams of marijuana for no remuneration. See INS Operations Instructions 242.1 (a)(28). The Board specifically noted that petitioner may move to reopen these proceedings if evidence is produced that petitioner received no remuneration in the marijuana transaction, or if his conviction is eventually expunged.

The Immigration judge did not err in permitting the Service to amend the order to show cause after the deportation hearing had concluded to reflect the fact that the substance involved in petitioner's conviction was marijuana. Identification of the substance does not appear to have been in issue, marijuana was specifically referred to in the indictment to which petitioner pleaded guilty. Moreover, the Immigration judge continued the hearing for two months to enable petitioner to respond to the amended charge.

Affirmed.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

August 9, 1977

File: A30 461 480 - Portland

In re: GERHARD FORSTNER

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gerald H. Robinson Esq.
300 Standard Plaza
Portland, OR 97204

ON BEHALF OF I&N SERVICE: George Indelicato
Appellate Trial
Attorney

ORAL ARGUMENT: April 5, 1977

CHARGE: Order: Sec. 241(a)(11), I&N Act (8 U.S.C. 1251 (a)(11)) - Convicted of a violation of any law or regulation governing the taxing, manufacture, sale, or the possession of a controlled drug to wit: illegal furnishing of narcotics (marijuana), in violation of Oregon Revised Statutes 167.207.

APPLICATION: Termination of proceedings.

This is an appeal from the November 2, 1976 decision of an immigration judge, in which he found the respondent deportable under section 241 (a)(11) of the Immigration and Nationality Act and ordered his deportation to Germany. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent is a 29-year-old native of Austria who was admitted to the United States on December 11, 1972, as an immigrant upon presentation of an immediate relative immigrant visa issued to him as the spouse of a United States citizen. He was convicted on December 1, 1975, of "Illegal Furnishing of Narcotics," to wit, marijuana, in violation of Oregon Revised Statute 167.207. Imposition of sentence was suspended and the defendant was placed on probation for eighteen months. In addition, he was fined $295.

The respondent contends that he was not finally convicted of any offense under Oregon law and within the meaning of the Immigration and Nationality Act. However, a conviction is final upon a plea of guilty. Matter of Robinson, Interim Decision 2351 (BIA 1975). The mere possibility that a conviction may be set aside does not keep it from being used for immigration purposes. Matter of R-R-, 7 I&N Dec. 478 (BIA 1957); Hernandez-Valensuela v. Rosenberg, 304F.2d 639 (9 Cir. 1962). Even a conviction for which the imposition of sentence was suspended and probation granted is still a conviction within the meaning of the Act. Matter of Wong, 12 I&N Dec. 721 (BIA 1968); Matter of O-, 7 I&N Dec. 539 (BIA 1957). Cf, Matter of Dela Cruz, Interim Decision 2482 (BIA 1976).

There has been no proof that the respondent was sentenced under a state statute comparable to the Federal Youth Corrections Act. (18 USC. Sec 5005 et. seq.) See Matter of Moeller, Interim Decision 2543 (BIA 1976). Nor has it been shown that Oregon Revised Statute 167.207 is the counterpart of the first offender provisions of the United States Code (21 U.S.C. 844(b)1)). See Matter of Werk, Interim Decision _____ (BIA May 26, 1977).

Inasmuch as the respondent's conviction has not been erased or expunged pursuant to either of the aforementioned types of statutes, his conviction was final for purposes of the Immigration and Nationality Act. Should he succeed in getting his conviction expunged pursuant to Oregon's "first offender" or "youthful offender" statutes, he could then move to reopen these proceedings.

The respondent further contends that "illegally furnishing narcotics" is a sweeping term which could mean activities which are not included within the meaning of section 241(a)(11) of the Act. Oregon Revised Statute 167.207 defines "furnishes" to mean "to sell, barter, exchange, give, or dispose to another, or to offer or agree to do the same, and includes each such transaction made by any person whether as principal, proprietor, agent, servant, or employee." Section 241 (a)(11) of the Immigration and Nationality Act requires the deportation of any alien who has been convicted of a violation of any law relating to the illicit possession of or traffic in narcotic drugs or marijuana or any law governing the exchange, dispension or, giving away of the same. 1/ Thus, we hold that although the term "barter" is not specifically listed in section 241(a)(11), it is included within the meaning of traffic, exchange or give away.

The respondent also contends that the immigration judge erred in permitting the Order to Show Cause to be amended over the objection of the respondent after the conclusion of the Service's case. However, the respondent was given additional time in which to respond to the "lodged charge" and the hearing was continued for two months. Although 8 C.F.R. 242.16(d) does require

that lodged charges be filed "during the hearing", the respondent was given ample time to prepare a response to the amended charge. Moreover, the only amendment actually made was the inclusion of the word "Marijuana" after narcotics and the reference to a specific provision in the Oregon Code. Thus, we find that the respondent suffered no prejudice from the procedure followed by the immigration judge and he was correctly found deportable by clear, convincing and unequivocal evidence.

Finally, at oral argument before this Board of April 5, 1977, the question was raised regarding the recent policy of the Service not to institute deportation proceedings against aliens convicted for possession or distribution for no remuneration of 100 grams or less of marijuana. See Service's Operations Instructions, O.I. 242.1(a)(28), as amended April 27, 1977.

1/ Section 241(a)(11) reads: Any alien in the United States shall, upon the order of the Attorney General, be deported who---. . . is, or hereafter at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, herion, marijuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction forming or addiction-sustaining opiate . . .

The respondent is clearly deportable within the meaning of section 241(a)(11) of the Act regardless of the amount of marijuana involved or whether it was "furnished" by him for remuneration.

The respondent is clearly deportable within the meaning of section 241(a)(11) of the Act regardless of the amount of marijuana involved or whether it was "furnished" by him for remuneration. Thus, it is of no consequence that the respondent's conviction was under a statute which punishes both the "giving" as well as the "selling" of a narcotic. Oregon Revised Statute Sec. 187.207.

Nevertheless, in behalf of the respondent, we checked to see if he falls within any policy the Immigration and Naturalization Service may have regarding not instituting deportation proceedings in certain 241 (a)(11) cases. In response to our inquiry in behalf of the respondent, the Service informed us by memorandum, dated April 18, 1977, that it was the Service position that the respondent's conviction does not fall within the aforementioned policy of the Service because a Pre-Sentence Report indicates that the respondent's conviction related to his distribution of 17.3 grams of marijuana for remuneration.

In a letter to this Board, dated April 25, 1977, the respondent requested that this memorandum be stricken from the files of this case and disregarded because it was based upon a report which is not a part of the record. However, the record speaks for itself. The respondent is clearly deportable under section 241 (a)(11) and this is evident without relying on the Service's memorandum.

Inasmuch as the Service has taken the position that the respondent's conviction does not fall within the aforementioned policy, no purpose would be served in remanding the record for a redetermination in light of this policy. Should the respondent succeed in producing evidence that no remuneration was in fact received for the marijuana "furnished" by him, or succeed in having the conviction expunged, he could then move to reopen these proceedings.

We note that the statement of Service policy presents no hard and fast relief from deportation and we have no authority to review a decision by the Service refusing to either defer the issuance of an Order to Show Cause 2/ or stay deportation. 3/

ORDER: The appeal is dismissed.

Louis Wilson
Acting chairman

2/ See Matter of Lennon, Interim Decision 2304 (BIA 1974); Matter of Merced, 14 I&N Dec. 644 (BIA 1974); Matter of Gallares, 14 I&N Dec. 250 (BIA 1972); Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971).

3/ See Matter of Paduano, 13 I&N Dec. 658 (BIA 1971).

APPENDIX C
UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A30 461 480 - Portland, Oregon
November 2, 1976

In the Matter of
GERHARD FORSTNER — IN DEPORTATION
Respondent — PROCEEDINGS

CHARGES (amended):
Section 241(a)(11), I and N Act - Has been convicted of a violation of any law or regulation, governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therin, to wit: Illegal furnishing of narcotics (marijuana), in violation of Oregon Revised Statutes 167.207.

APPLICATION: None

IN BEHALF OF RESPONDENT:
Gerald H. Robinson, Esq.
300 Standard Plaza
Portland, Oregon 97204

IN BEHALF OF SERVICE:
F. Ernest Ayers
Trial Attorney
Seattle, Washington

DECISION OF THE U. S. IMMIGRATION JUDGE

The respondent is a 28-year old married male. During the course of the hearing he admitted

the first four allegations contained in the Order to Show Cause, denied the amended fifth allegation, and also denied deportability on the amended charge. The admitted allegations establish that he is an alien, native and citizen of Austria, who entered the United States at New York, New York, on December 11, 1972, as an immigrant. The denied amended allegation asserts that he was convicted on December 1, 1975, in the Circuit Court of the State of Oregon for Lane County of illegally furnishing narcotics, to wit, marijuana. Austria was selected as country of deportation should deportation become necessary.

As to the question of deportability, there is contained in the record, Exhibit 2, a record of conviction consisting of an indictment, change of plea, and order of probation reflecting that the respondent on December 1, 1975, pleaded guilty in the Circuit Court of the State of Oregon for Lane County to the offense of illegally furnishing narcotics. It is respondent's contention, firstly, that "illegally furnishing narcotics" is a sweeping term and could include substances that do not fall within the amended charge and that "furnishing" could mean activities which are not included in said charge; and, secondly, as the imposition of sentence was suspended in his case, he was not actually convicted. As to his first contention, suffice it to say that marijuana under Oregon law is a substance listed under offenses involving narcotic and dangerous drugs and "furnishing" means to sell, barter, exchange, give or dispense to another or offer to do so. The Oregon law itself clearly brings the respondent within the ambit of the section of the Immigration and Nationality Act under which he is charged. As to the respondent's second contention, the record of conviction clearly establishes that he was convicted as alleged in Allegation No. 5, when he pleaded guilty on December 1, 1975. Without any further comment as

to this contention, I find that he was convicted. The fifth allegation is established. Respondent is deportable on evidence which is clear, unequivocal, and convincing.

As mentioned previously the respondent is married. His wife is a citizen of the United States. They have no children. Other than his wife, he has no close relatives in the United States as they all reside in Austria. Not being unmindful of the fact that he is the spouse of a citizen of the United States, because of the nature of his conviction, it being involved with marijuana, and the recency thereof, it having occurred in 1975, I have no alternative but to order his deportation and this will be done.

ORDER: It is ordered that respondent be deported from the United States to Germany on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that, if the aforenamed country advises the Attorney General that it is unwilling to accept respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, respondent shall be deported to Austria.

Newton T. Jones
U.S. Immigration Judge

APPENDIX D
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERHARD FORSTNER,
Petitioner
v.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

Filed Aug. 2, 1978
Emil E. Melfi, Jr.
U.S. Court of Appeals

Before: BROWNING and ANDERSON, Circuit Judges, and WATERS,*District Judge

The petition for rehearing is denied.

*Honorable Laughlin E. Waters, United States District Judge, Central District of California, sitting by designation.

APPENDIX E
UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE AND NOTICE OF HEARING

In Deportation Proceedings under Section 242
of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of Gerhard Forstner

Respondent

To: Mr. Gerhard Forstner File No. A30 461 480
358 West 15th Street, Eugene, Oregon 97401

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Austria and a citizen of Austria
3. You entered the United States at New York, New York on or about December 11, 1972;
4. At that time you were admitted as an immigrant;
5. You were convicted on December 1, 1975 in the Circuit Court of the State of Oregon For Lane County of "Illegal Furnishing of Narcotics".

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:
Section 241(a)(11) of the Immigration and Nationality Act, in that, you have been convicted of a violation of any law or regulation, governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange,

dispensing, giving away, importation or exportation of any of the drugs described therein: Illegal Furnishing of Narcotics.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Offier of the Immigration and Naturalization Service of the United States Department of Justice at Room 322, U.S. Courthouse, S.W. Broadway & Main, Portland, Oregon on Tuesday, June 15, 1976 at 3:00 p.m., and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: May 27, 1976 IMMIGRATION AND NATURALIZATION SERVICE
L.H. Dahlin, District Director
Portland, Oregon

NOTICE TO RESPONDENT
ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS
THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

When you appear you may, if you wish, admit that the allegations contained in the Order to Show Cause are true and that you are deportable from the United States on the charges set forth therein. Such admission may constitute a waiver of any further

hearing as to your deportability. If you do not admit that the allegations and charges are true, you will be given reasonable opportunity to present evidence on your own behalf, to examine the Government's evidence, and to cross-examine any witnesses presented by the Government.

You may apply at the hearing for voluntary departure in lieu of deportation. Moreover, if you appear to be eligible to acquire lawful permanent resident status the special inquiry office will explain this to you at the hearing and give you an opportunity to apply.

You will be asked during the hearing to select a country to which you choose to be deported in the event that your deportation is required by law. The special inquiry officer will also notify you concerning any other country or countries to which your deportation may be directed pursuant to law; and upon receipt of this information, you will have an opportunity to apply during the hearing for temporary withholding of deportation if you believe you would be subject to persecution in any such country on account of race, religion, or political opinion.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service without further notice or in a determination being made by the special inquiry officer in your absence.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent)

Before:

(Signature and title of witnessing officer)

(date)

CERTIFICATE OF SERVICE

This order and notice were mailed by me on May 27, 1976 in the following manner:

CERTIFIED MAIL
Return Receipt Requested

Mabel A. Mattson
Clerk-Steno

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

UNITED STATES OF AMERICA:

File No. A30 461 480

In the Matter of

FORSTNER, Gerhard

Respondent

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

AMENDED CHARGES OF DEPORTABILITY

To: Gerhard Forstner
358 West 15th Street
Eugene, Oregon 97401

There is hereby lodged against you the amended charge(s) that you are subject to be taken into custody and deported pursuant to the following provision(s) of law: The charge in the original Order to Show Cause dated May 27, 1976 is amended to read as follows:

Section 241(a)(11) of the Immigration and Nationality Act, in that, you have been convicted of a violation of any law or regulation, governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein: to wit, Illegal importation or exportation of any of the drugs described therein: to wit, Illegal furnishing of narcotics, (marijuana), in violation of Oregon Revised Statute 167.207.

In support of the amended charge(s) there is submitted the following factual allegation(s) in addition to those set forth in the order to show cause and notice of hearing: Factual allegation #5 in the original order to show cause dated May 27, 1976 is amended to read as follows:

5. You were convicted on December 1, 1975 in the Circuit Court of the State of Oregon for Lane County of "Illegal Furnishing of Narcotics", to wit marijuana, in violation of Oregon Revised Statute 167.207.

June 15, 1976

F. Ernest Ayers
Trial Attorney

APPENDIX G

Amendment No. 5, U. S. Constitution

Provisions concerning prosecution. Trial and punishment--prviate property not to be taken for public use without compensation.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property; without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX H

8 USC 1141(a)(11)
(Sec. 241(a)(11), IMMIGRATION AND NATIONALITY ACT)

SEC 241(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who--

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;

APPENDIX I

8 CFR Sec. 103.5

§103.5 Reopening or reconsideration.

Except as otherwise provided in Part 242 of this chapter, a proceeding authorized under this chapter may be reopened or the decision made therein reconsidered for proper cause upon motion made by the party affected and granted by the officer who has jurisdiction over the proceeding or who made the decision. When the alien is the moving party, a motion to reopen or a motion to reconsider shall be filed in duplicate, accompanied by a supporting brief, if any, and the appropriate fee specified by and remitted in accordance with the provisions of §103.7, with the district director in whose district the proceeding was conducted for transmittal to the officer having jurisdiction. When an officer of the Service is the moving party, a copy of the motion shall be served on the alien or other party in interest and the motion, together with proof of service, shall be filed directly with the officer having jurisdiction. The party opposing the motion shall have 10 days from the date of service thereof within which he may submit a brief, which period may be extended. If the officer who originally decided the case is unavailable, the motion may be referred to another officer. A motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent. Motions to reopen or reconsider shall state whether the validity of the order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. Rulings upon motions to reopen or motions to reconsider shall be by written decision. The filing of a motion to reopen or a motion to reconsider or of a subsequent application after notice of denial shall not, unless the Service directs otherwise, serve to stay the execution of any decision made in the case or to extend a previously set departure date.

APPENDIX J

8 CFR Sec. 242.16(d)

§242.16 Hearing.

(a) *Opening.* The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; place the respondent under oath; read the factual allegations and the charges in the order to show cause to the respondent and explain them in nontechnical language, and enter the order to show cause as an exhibit in the record. Deportation hearings shall be open to the public, except that the special inquiry officer may, in his discretion and for the purpose of protecting witnesses, respondents, or the public interest, direct that the general public or particular individuals shall be excluded from the hearing in any specific case. Depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public.

(b) *Pleading by respondent.* The special inquiry officer shall require the respondent to plead to the order to show cause by stating whether he admits or denies the factual allegations and his deportability under the charges contained therein. If the respondent admits the factual allegations and admits his deportability under the charges and the special inquiry officer is satisfied that no issues of law or fact remain, the special inquiry officer may determine that deportability as charged has been established by the admissions of the respondent. The special inquiry officer shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the special inquiry officer may not accept an admission of deportability, he shall direct a hearing on the issues.

(c) *Issues of deportability.* When deportability is not determined under the provisions of paragraph (b) of this section, the special inquiry officer shall request the assignment of a trial attorney, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading.

(d) *Additional charges.* A trial attorney who has been assigned to a case may at any time during a hearing lodge additional charges of deportability, including factual allegations against the respondent. The additional factual allegations and charges shall be submitted in writing and entered as an exhibit in the record. The special inquiry officer shall read the additional factual allegations and charges to the respondent and explain them to him in nontechnical language. The special inquiry officer shall advise the respondent if he is not represented by counsel that he may be so represented and also that he may have a reasonable time within which to meet the additional factual allegations and charges. The respondent shall be required to state then and there whether he desires a continuance for either of these reasons. Thereafter, the provisions of paragraph (b) of this section shall apply to the additional factual allegations and lodged charges.

APPENDIX K

8 CFR Sec. 1242.22

§242.22 Reopening or reconsideration.

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of §103.5 of this chapter. The special inquiry officer may upon his own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he had made a decision, unless jurisdiction in the case is vested in the Board under Part 3 of this chapter. An order by the special inquiry officer granting a motion to reopen may be made on Form I-328. A motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; nor will any motion to reopen for the purpose of providing the respondent with an opportunity to make an application under §242.17 be granted if respondent's right to make such application was fully explained to him by the special inquiry officer and he was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made. The filing of an application for adjustment of status under section 245 of the Act may be considered as the motion to reopen when the application shows new material not available or ascertainable at the time of the deportation hearing. The filing with a special inquiry officer of a motion under this section shall not serve to stay the execution of an outstanding decision; execution shall proceed unless the special inquiry officer who has jurisdiction over the motion specifically grants a stay of deportation. In his discretion, the special inquiry officer may stay deportation pending his determination of the motion and also pending the taking and disposition of an appeal from such determination.

APPENDIX L

OPERATIONS INSTRUCTION 242.1(a)(28)

(2) Unless prior approval has been received from the regional commissioner, no order to show cause shall be issued in the case of an alien who is a lawful permanent resident of the United States and whose deportability is based on section 241(a)(11) as one having been convicted of possession, importation or distribution of marijuana involved does not exceed 100 grams: Provided further, that in the case of a conviction for distribution without remuneration, the alien has been convicted of only one such offense.

APPENDIX M

Oregon Revised Statutes, Sec. 137.010

137.010 Duty of court to ascertain and impose punishment. (1) The statutes that define offenses impose a duty upon the court having jurisdiction to pass sentence in accordance with this section unless otherwise specifically provided by law.

(2) When a person is convicted of an offense, if the court is of the opinion that it is in the best interests of the public as well as of the defendant, the court may suspend the imposition or execution of sentence for any period of not more than five years.

(3) If the court suspends the imposition or execution of sentence, the court may also place the defendant on probation for a definite or indefinite period of not less than one nor more than five years.

(4) The power of the judge of any court to suspend execution of sentence or to grant probation to any person convicted of a crime shall continue until the person is delivered to the custody of the Corrections Division.

(5) When a person is convicted of an offense and the court does not suspend the imposition or execution of sentence or when a suspended sentence or probation is revoked, the court shall impose the following sentence:

(a) A term of imprisonment; or

(b) A fine; or

(c) Both imprisonment and a fine; or

(d) Discharge of the defendant.

(6) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office or impose any other civil penalty. An order exercising that authority may be included as part of the judgment of conviction.

[Amended by 1971 c.743 s.322]

APPENDIX N

Oregon Revised Statutes, Sec. 137.225

137.225 Order setting aside conviction; prerequisites; limitations. (1) Every defendant convicted of a Class C felony, or the crime of possession of the narcotic drug marijuana when that crime was punishable as a felony only, or a crime punishable as either a felony or a misdemeanor in the discretion of the court, or a misdemeanor, including a violation of a municipal ordinance for which a jail sentence may be imposed, or a violation as described by ORS 167.207, 167.217 or 167.222, at any time after the lapse of three years from the date of pronouncement of judgment, if he has fully complied with and performed the sentence of the court, and is not under charge of commission of any crime, may move the court wherein such conviction was entered for an entry of an order setting aside such conviction. A copy of the motion and a full set of the defendant's fingerprints shall be served upon the office of the prosecuting attorney who prosecuted the crime or violation and opportunity be given to contest the motion. The fingerprint card with the notation "motion for setting aside conviction" shall be forwarded to the bureau. Information resulting from the fingerprint search along with the fingerprint card shall be returned to the prosecuting attorney. Upon hearing the motion the court may require the filing of such affidavits and may require the taking of such proofs as it deems proper. If the court determines that the circumstances and behavior of the applicant from the date of conviction to the date of the hearing on the motion warrant setting aside the conviction, it shall enter an appropriate order which shall state the original arrest charge and the conviction charge if different from the original, date of charge, submitting agency and disposition. The order shall further state that positive identification has been established by the bureau and further identified as to state bureau number or submitting agency number. Upon the entry of

Oregon Revised Statutes, Sec. 137.225

such an order, the applicant for purposes of the law shall be deemed not to have been previously convicted and the court shall issue an order sealing the record of conviction and other official records in the case, including the records of arrest resulting in the criminal proceeding. The clerk of the court shall forward a certified copy of the order to such agencies as directed by the court. A certified copy must be sent to the Corrections Division when the person has been in the custody of the Corrections Division. Upon entry of such an order, such conviction, arrest or other proceeding shall be deemed not to have occurred, and the applicant may answer accordingly any questions relating to their occurrence.

(2) The provisions of subsection (1) of this section do not apply to:

(a) A state or municipal traffic offense; or

(b) A person convicted, within the 10-year period immediately preceding the filing of his motion pursuant to subsection (1) of this section, of more than one offense, excluding motor vehicle violations, whether the second or additional convictions occurred in the same action in which the conviction as to which relief is sought occurred or in another action. Notwithstanding subsection (1) of this section, a conviction which has been set aside under this section shall be considered for the purpose of determining whether this paragraph is applicable.

(3) The provisions of subsection (1) of this section apply to convictions which occurred before, as well as those which occurred after, September 9, 1971.

(4) For purposes of any civil action in which truth is an element of a cause of action or affirmative defense, the provisions of this section providing that the conviction, arrest or other proceeding be deemed not to have occurred shall not apply and a party may apply to the court for an order requiring disclosure of the official records in the case as may be necessary in the interest of justice.

APPENDIX O

Oregon Revised Statutes, Sec. 137.230

137.230 Definitions for ORS 137.230 and 137.260. As used in ORS 137.230 and 137.260, "conviction" or "convicted" means an adjudication of guilt upon a verdict or finding entered in a criminal proceeding in a court of competent jurisdiction.

APPENDIX P

Oregon Revised Statutes Sec. 167.202

167.202 Definitions for ORS 167.202 to 167.252. As used in ORS 167.202 to 167.252, unless the context requires otherwise:

(1) "Apothecary," "coca leaves," "dispense," "federal narcotic laws," "manufacturer," "marijuana," "narcotic drugs," "official written order," "opium" and "wholesaler" have the meaning provided for those terms in ORS 474.010.

(2) "Dangerous drugs" means dangerous drugs as defined in ORS 475.010.

(3) "Furnishes" means to sell, barter, exchange, give or dispose to another, or to offer or agree to do the same, and includes each such transaction made by any person, whether as principal, proprietor, agent, servant or employe.

(4) "Unlawfully" means in violation of any provision of ORS chapter 474 or 475.

[1971 c.743 s.273; 1974 s.s. c.67 s.1]

167.205[Amended by 1961 c.333 s.1; repealed by 1971 c.743 s.432]

APPENDIX Q

Oregon Revised Statutes Sec. 167.207

167.207 Criminal activity in drugs. (1) A person commits the offense of criminal activity in drugs if he knowingly and unlawfully manufactures, cultivates, transports, possesses, furnishes, prescribes, administers, dispenses or compounds a narcotic or dangerous drug.

(2) Except as provided in subsections (3) and (4) of this section, criminal activity in drugs is a Class B felony, or the court may, under the criteria set forth in ORS 161.705, enter judgment for a Class A misdemeanor and impose sentence accordingly.

(3) Notwithstanding subsection (2) of this section, if the conviction is for possession of less than one avoirdupois ounce of marijuana it is a violation punishable by a fine of not more than $100.

(4) Notwithstanding subsection (2) of this section, if the defendant is 18 years of age or over and the conviction is for furnishing a narcotic or dangerous drug to a person under 18 years of age and who is at least three years younger than the defendant, criminal activity in drugs in a Class A felony.

Supreme Court, U.S.
FILED
DEC 14 1978

No. 78-659

In the Supreme Court of the United States

OCTOBER TERM, 1978

GERHARD FORSTNER, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-659

GERHARD FORSTNER, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that his guilty plea to a state charge of "illegal furnishing of narcotics" did not subject him to deportation under 8 U.S.C. 1251(a)(11) as an alien who has been convicted of violating a "law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or * * * any law or regulation governing or controlling the * * * sale, exchange, dispensing, [or] giving away" of those substances.

1. Petitioner, a native and citizen of Austria, entered the United States as a lawful permanent resident on December 11, 1972, as the spouse of a United States citizen (Pet. App. A-5). On December 1, 1975, he pleaded guilty to a charge of "illegal furnishing of narcotics" in violation of Or. Rev. Stat. § 167.207 (1975) (A.R. 120-124).[1] Imposition of sentence was suspended, and peti-

[1] "A.R." refers to the administrative record filed in the court of appeals. Pursuant to a plea bargain, a second charge was dismissed (see Pet. 5-6).

tioner was placed on probation for eighteen months and fined $295 (Pet. App. A-5; A.R. 120-121).

Deportation proceedings were instituted on May 27, 1976, by an order to show cause alleging that petitioner had been convicted of the offense of illegal furnishing of narcotics in violation of state law, and that he was therefore deportable under Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11) (Pet. App. A-14 to A-16). The immigration judge found petitioner deportable (Pet. App. A-10 to A-12), and the Board of Immigration Appeals affirmed (Pet. App. A-4 to A-9). The court of appeals in turn affirmed the decision of the Board (Pet. App. A-1 to A-3; 579 F. 2d 506).

2. Petitioner contends (Pet. 8-12) that his state conviction for "illegal furnishing of narcotics" is ambiguous, because the state statute covers conduct that is not within the scope of 8 U.S.C. 1251(a)(11). Oregon Revised Statute § 167.202(3) (1975) provides that " '[f]urnishes' means to sell, barter, exchange, give or dispose to another, or to offer or agree to do the same * * *." Petitioner argues that the Oregon statute, unlike Section 1251(a)(1), applies to "barter" and to a mere "offer" to barter. He therefore contends that the proof that he pled guilty to the state offense did not establish his deportability by clear and convincing evidence.

The court of appeals correctly rejected this argument, observing (Pet. App. A-2) that "[n]othing in the legislative history suggests Congress intended to limit the broad scope" of Section 1251(a)(11), which extends to any violation or conspiracy to violate "any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or * * * any law or regulation governing or controlling the * * * sale, exchange, dispensing, [or] giving away" of those substances. The Oregon offense of furnishing narcotics fits comfortably

within this broad federal definition. See *Bronsztejn* v. *INS*, 526 F. 2d 1290 (2d Cir. 1975) (conviction for attempted possession of marijuana a deportable offense under 8 U.S.C. 1251(a)(11)). Moreover, the record indicates (Pet. App. A-8; A.R. 41) that petitioner's state conviction resulted from the sale of marijuana, not barter or a mere offer to barter.

2. Petitioner next contends (Pet. 13-17) that because his conviction may be expunged pursuant to Or. Rev. Stat. § 137.225 (1975), it is not sufficiently final to provide the basis for deportation.

It is well settled that a conviction has attained the finality necessary to support a deportation order under 8 U.S.C. 1251(a)(11) when the alien has exhausted or waived his right to direct appellate review. *Marino* v. *INS*, 537 F. 2d 686, 691-692 (2d Cir. 1976). Petitioner's conviction is thus final, for the purpose of Section 1251(a)(11), and the possibility of an expungement has no bearing on his present deportability.

Moreover, even if petitioner's conviction is expunged, that would not prevent his deportation. The general rule is that a state expungement of a narcotics or marijuana conviction has no effect on deportability. *Kolios* v. *INS*, 532 F. 2d 786 (1st Cir. 1976), cert. denied, 429 U.S. 884 (1976); *Gonzalez de Lara* v. *United States*, 439 F. 2d 1316 (5th Cir. 1971); *Tsimbidy-Rochu* v. *INS*, 414 F. 2d 797 (9th Cir. 1969); *Matter of A-F-*, 8 I. & N. Dec. 429, 441 (A.G. 1959). There are two limited exceptions to this rule: convictions pursuant to a state counterpart of the Federal Youth Corrections Act (18 U.S.C. 5005, *et seq.*), see *Matter of Berker*, Interim Decision No. 2511 (BIA 1976), and convictions pursuant to a state counterpart of the first offender provisions for simple drug possession under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 844). See *Rehman* v. *INS*, 544 F. 2d 71 (2d Cir. 1976); *Matter of Werk*, Interim Decision No.

2589 (BIA 1977). Petitioner's conviction does not fall within either of these two limited exceptions, since Or. Rev. Stat. § 167.207 is neither a youthful offender nor a first offender provision. (Nor was petitioner's conviction for simple possession, as required by the second exception.)[2]

4. Petitioner's final contention (Pet. 18-21) is that he was denied due process of law because the immigration judge permitted the INS to amend the order to show cause at the close of the deportation hearing. Petitioner argues that permitting amendment was prejudicial because there was insufficient evidence to support the charge as originally drafted. He also urges that the procedure by which the charge was amended did not satisfy the INS's regulations.

This claim is insubstantial. The order to show cause originally alleged that petitioner was "convicted on December 1, 1975, in the Circuit Court of the State of Oregon for Lane County of 'Illegal Furnishing of Narcotics' " (A.R. 118). The INS offered as proof the order of probation and change of pleas, both of which recited petitioner's guilty plea to the charge of "ILLEGAL FURNISHING OF NARCOTICS," and the indictment, which charged that petitioner "unlawfully and knowingly furnish[ed] the narcotic drug marijuana" and cited Or. Rev. Stat. § 167.207 (A.R. 97, 120-123). Before the hearing concluded, the INS moved to amend the order to show cause to specify that the substance furnished was marijuana (A.R. 109-110). This amendment was not necessary, since the original allegation adequately informed petitioner of the charge he would have to meet, and the evidence sustained the charge. Nevertheless, the

[2]The Board of Immigration Appeals so recognized (Pet. App. A-5 to A-6), adding that "[s]hould [petitioner] succeed in getting his conviction expunged pursuant to Oregon's 'first offender' or 'youthful offender' statutes, he could then move to reopen these proceedings."

immigration judge granted the motion, but continued the hearing for two months to enable petitioner to respond to the amended charge (Pet. App. A-6 to A-7).

This procedure did not violate petitioner's right to due process. Nor did it contravene the Service's regulations, which permit the trial attorney to lodge additional charges "at any time during a hearing." 8 C.F.R. 242.16(d). Although petitioner opposed the amendment on the ground that the Service had already rested, the hearing had not yet been concluded, and the immigration judge ruled that the amendment was proper (A.R. 110-111; compare A.R. 117).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[1]Petitioner also suggests (Pet. 20) that the Service failed to abide by the policy that it would not institute deportation proceedings against aliens convicted of possession, importation, or distribution of less than 100 grams of marijuana for no remuneration. See INS Operations Instructions §242.1(a)(28) (1977). However, as we have already noted, petitioner's conviction arose from a sale of marijuana (Pet. App. A-8; A.R. 41).

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